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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-607

SAMUEL RIZZO DeCAVALCANTE,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals entered on September 10, 1971.

OPINIONS BELOW.

The opinion of the court of appeals (not yet reported) is reprinted in the Appendix, *infra*, pp. 29-33. The findings of fact and conclusions of law upon which the district court based its refusal to permit petitioner to withdraw his plea appear at pp. 35-38 *infra*.

JURISDICTION.

The judgment of the court of appeals was entered on September 10, 1971 (Appendix, *infra,* p. 34). By order dated October 10, 1971, Mr. Justice Brennan extended to November 9, 1971, the time for filing a petition. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether a prosecutor's threat to charge a defendant as a "dangerous special offender" (thus elevating the potential penalty from five years to twenty-five years) if the defendant goes to trial, but to forego that additional charge (as well as recommend a lenient sentence) if the defendant pleads guilty, requires the district court, when these undisputed facts are brought to its attention *prior* to sentencing, to permit the defendant to withdraw his guilty plea.

2. Whether in any event petitioner must be afforded the opportunity to plead anew when it appears that Rule 11, F. R. Cr. P., was violated (a) because the Government failed to advise the court of the promises and threats which elicited his plea of guilty and (b) because the district judge failed to ascertain whether "there was a factual basis for the plea".

STATUTES AND RULES INVOLVED.

1. Petitioner was indicted on a charge of violating 18 U. S. C. 1952 (federal gambling laws), which then read in pertinent part as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.
>
> (c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

2. The "dangerous special offender" provision (18 U. S. C. 3575) which the prosecutor stated that he would invoke if petitioner went to trial provides:

> (a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.
>
> (b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is im-

posed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing pen-

alties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous

offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, with-

out reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

3. Federal Rules of Criminal Procedure:

Rule 11. *Pleas.* A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Rule 32(d). *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT.

1. The following chronology is set forth to place the issues in context.

In May 1968, petitioner was indicted on charges of conspiracy to extort.[1] That case is not before this Court but forms a part of the relevant background.

Some twenty-one months later, on December 15, 1969, petitioner was indicted in the instant case on a charge of conspiracy to violate the federal laws prohibiting use of an interstate telephone to facilitate unlawful gambling (R. 46).[2]

The extortion case was brought to trial in September 1970. Petitioner was convicted on three counts and was sentenced on October 2, 1970 to five years' imprisonment on each count, the sentences to run consecutively. He has been in confinement since that date.

On January 2, 1970, while the extortion case was pending on appeal to the Third Circuit, petitioner entered a plea of not guilty to the instant indictment (R. 6). Eleven months later, in December 1970, the district judge set the case to be tried on February 2, 1971.

On January 15, 1971, following conversations between government counsel and attorneys who then represented petitioner, petitioner was brought from his place of confinement to an office in the United States Courthouse in Newark, New Jersey. Immediately after the meeting which took place at that time between petitioner, his counsel and representatives of the government, petitioner decided to retract his plea of not guilty and to plead guilty to the instant indictment (R. 51-119). He was promptly taken

1. See *United States v. DeCavalcante,* 440 F. 2d 1264 (3d Cir. 1971).

2. "R." references are to the appendix submitted by petitioner in the court of appeals and on file with this Court.

before the district judge, who conducted a hearing *in camera*. The motion to withdraw the plea of not guilty was thereupon granted and a plea of guilty entered (R. 36-45).

On March 10, 1971, the Third Circuit reversed petitioner's conviction in the extortion case, directing an acquittal on two counts and remanding the third count for a new trial. *United States v. DeCavalcante*, 440 F. 2d 1264.

On March 12, 1971, sentence not yet having been imposed, petitioner moved for leave to withdraw his plea of guilty to the instant indictment (R. 50). A hearing was held on that motion on March 15, 1971. After hearing testimony and argument, the district judge denied the motion [3] and forthwith sentenced petitioner to the statutory maximum, five years' imprisonment and a $10,000 fine [4] (R. 71-176).

2. The portion of the statement which follows details the circumstances which bear upon petitioner's decision to plead guilty and his subsequent motion to withdraw that plea. The facts upon which petitioner relies are undisputed. They are indeed confirmed in all essential aspects by the testimony of the Government's representatives.

On January 13, 1971, Herbert T. Posner, the Government attorney in charge of prosecuting the gambling-law charge against petitioner, encountered Samuel Bozza, a New Jersey lawyer who acted as an adviser to petitioner and had represented him in the extortion case (R. 76, 81-83, 108). In Mr. Posner's words, he told Mr. Bozza that he had been authorized by his superiors "to file a notification

3. Subsequently, on May 19, 1971, the district court entered a formal order denying the motion. Appendix, *infra*, pp. 35-38.

4. Petitioner's conviction on the extortion charges having been reversed, he had no prior convictions.

seeking to treat Mr. Devalcante as a special dangerous offender, in the event he was convicted" under the instant indictment (R. 109). Posner indicated further that he had had that authorization "as far back as October or September" (*ibid*). Bozza replied, "if you throw the guy in for another twenty-five years, that it would be like killing him" (*ibid*).[5] Posner then stated (and we continue to quote from Posner's account of the conversation) that if petitioner "were to plead guilty, the Government would recommend a concurrent sentence . . ." (*ibid.*).[6] He added, "The Government would not oppose the imposition of a suspended sentence should the Court be so inclined" (*ibid*). Mr. Bozza responded, according to Mr. Posner, "I am going to see him [petitioner] and make him plead" (*ibid*).

Bozza thereupon visited petitioner in jail and advised him that he "should enter a plea because I felt that the concurrent term would result in serving no time at all on this present indictment" (R. 78). Petitioner expressed concern that a plea of guilty might lead to his serving a sentence even if the extortion conviction were reversed, and inquired whether the Government would recommend a suspended sentence (R. 79). Bozza telephoned Posner on January 14th and it was agreed that petitioner would be brought to Newark for a conference the following day (R. 79-80, 110).

Five persons were present at the ensuing conference held on January 15, 1971: petitioner, his counsel of record in the district court (Raymond Brown), Government Attorney Posner and two Government Agents (R. 110). Mr. Posner gives the following account (R. 111-112):

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5. Petitioner, at that time, was 58 years old.

6. When the conversation took place, the extortion conviction had not yet been reversed.

> . . . I informed Mr. DeCavalcante and reminded Mr. Brown because I told Mr. Brown and Mr. Vogelman several times I had been instructed to file the notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted of this charge, and that he might be liable to a sentence of twenty-five years upon conviction. I told Mr. DeCavalcante and Mr. Brown that in the event Mr. DeCavalcante pled guilty, I would be precluded from filing this notification because the language of the statute itself said this notification shall not be filed unless there is a reasonable time before trial. At that point, Mr. DeCavalcante said, I want a suspended sentence and I said, the Government would recommend a concurrent sentence and we would not oppose the imposition of a suspended sentence if the Court was so inclined, but I reiterated to Mr. DeCavalcante and Mr. Brown that in no way would this be taken as a guarantee as to what the sentence would be.

Petitioner remonstrated, "I know no more about this conspiracy than you do, Mr. Posner" (testimony of Agent Sontag, R. 119) and was told by his attorney that he must be prepared to acknowledge his guilt in open court if he proposed to plead guilty (R. 118; see, also, R. 112-113). Petitioner renewed the question of a suspended sentence but was told only that the Government would not oppose if the court were so inclined (R. 113, 117). After a brief discussion of petitioner's desire to avoid further adverse publicity for his family, the Government's representatives withdrew and petitioner spoke for some minutes with his counsel (R. 113, 118).

According to Mr. Brown, petitioner had always insisted, from the time he was charged, that he was not guilty (R. 126-127). During the private conference with his

lawyer on January 15th, "He said merely to me, I am going to plead guilty. That is all. I could get no more out of him. I tried. That was it." (R. 127).

Following petitioner's decision to plead guilty, he was taken immediately before the District Judge (Garth, J.). Judge Garth read the indictment, advised petitioner of the statutory penalties for the offense charged, and asked him whether he had performed or caused to be performed the acts charged to him (R. 41). Petitioner replied, "I plead guilty" (R. 42). The judge inquired further whether the plea was voluntary (to which petitioner answered, "yes") and whether there had been any threats or promises or any understanding or prediction as to the sentence petitioner would receive (to which petitioner replied, "no") (R. 42-43). The judge also addressed Mr. Brown and asked if he knew of any reason why a guilty plea should not be substituted. Mr. Brown stated that he had advised petitioner not to plead guilty if he were not in fact guilty and that petitioner "informed me that he was pleading guilty to the charge. That's all he said." (R. 43). No reference was made by any person present[7] to Mr. Posner's statements, made within the hour, that (1) the government would invoke the "dangerous special offender" statute if petitioner failed to plead guilty and (2) that it would recommend a concurrent sentence and not oppose a suspended sentence if that plea were entered.

The district judge was first informed of these communications some two months later, on March 15, 1971, when he conducted a hearing on petitioner's motion to withdraw his plea of guilty.[8] At that hearing, petitioner testified that he was innocent of the charge and that he had

7. The Government was represented at the hearing by Mr. Posner and two other attorneys (R. 32).

8. By the time the second hearing took place, petitioner's conviction on the extortion charge had been reversed by the Third Circuit.

been influenced by what Mr. Bozza and Mr. Posner had told him (R. 88-89). They pressed him, he stated, by showing him a "new law out on felonies where you automatically get twenty-five years" (R. 89). Mr. Bozza advised him that he was not "going to get hurt" if he pleaded guilty (R. 89). One of the Government's representatives showed him, at the Newark meeting of January 15th, "a piece of paper that represented twenty-five additional years." (R. 94). He further testified that, when he decided to yield, he was ill (having been sick in jail for six or seven weeks), tired and "running out of gas." (R. 90, 93). He felt he could not "stand another trial." (R. 90).

In denying petitioner's motion to withdraw his plea of guilty, the district judge did not find any of the underlying facts to be contrary to the testimony recited above. (See Appendix, *infra,* pp. 35-37.) However, he regarded the facts as insufficient to warrant withdrawal of the plea in view of the Government's allegation that it would be prejudiced because its witnesses had dispersed. See discussion, *infra,* p. 22, note 12.

The court of appeals affirmed on the ground that the district court had permissibly exercised its discretion. (Appendix, *infra,* pp. 32-33.)

REASONS FOR GRANTING THE WRIT.

This case, like *Santobello v. New York*, No. 70-98 (in which the Court has granted certiorari), raises important issues as to the limits and safeguards which should attend the acceptance of "negotiated" guilty pleas.

In *Brady v. United States*, 397 U. S. 742 (1970), and *Parker v. North Carolina*, 397 U. S. 790 (1970), the Court held that a guilty plea is not invalid merely because induced by the hope or certainty of a more lenient sentence than might be imposed if the defendant went to trial. The Court recognized, however, that "negotiated" pleas induced by threats, misrepresentations or other improper conduct on the part of the prosecution are not immune from attack. In *Santobello*, the issue before the Court is the validity of a negotiated plea after the prosecutor reneges on the bargain that induced the plea. The instant case involves another, but no less serious, species of prosecutorial misconduct—the use of threats by the prosecutor as a means of inducing a plea of guilty. Here, the threshold question is whether a defendant should be permitted to withdraw his plea prior to sentencing when it is admitted by the prosecution (and found by the district court) that the plea followed the prosecutor's statement that he would lodge an additional charge against the defendant unless the defendant agreed to plea guilty.

A closely related issue is whether opportunity to plead anew must in all events be afforded because of lack of compliance with Rule 11 of the Federal Rules of Criminal Procedure. This has two dimensions: (a) the prosecution's failure to inform the court, when the plea of guilty was tendered, of the threats and promises which elicited the plea; (b) the district judge's failure to ascertain whether there was "a factual basis for the plea." *McCarthy v. United States*, 394 U. S. 459 (1969), requires that these

failings be corrected and in light of this Court's ruling in *Brady* that negotiated pleas are ordinarily valid it becomes more important than ever to insist upon strict adherence to the protective procedures of Rule 11.

I.

A. In September or October of 1970, the federal prosecutor in this case was authorized by the Department of Justice to file an information against petitioner under the "dangerous special offender" provision of the Organized Crime Control Act of 1970 (18 U. S. C. 3575). Under this provision a federal prosecutor may file such an information within "a reasonable time before trial or acceptance by the court of a plea of guilty" on a pending charge. If the defendant subsequently pleads or is found guilty, and the court determines that he is a dangerous special offender within the meaning of the statute, the defendant is subject to a term of imprisonment of up to twenty-five years, even though the maximum term of imprisonment for the offense charged in the original indictment may be lower (as in the present case where the maximum term of imprisonment for the gambling charge was five years).

Although the prosecutor had this authorization in the Fall of 1970, instead of filing an information he held the charge in abeyance for a period of months and used its threat to broach the question of a guilty plea with one of petitioner's lawyers. On January 13, 1971, he informed this lawyer that he had authority to charge petitioner as a dangerous special offender, but that he would not do so if petitioner "were to plead guilty"; indeed, the Government would recommend no additional term of imprisonment for petitioner (over and above that to which he had already been sentenced on another offense) if petitioner would consent to such a plea.

A meeting between petitioner and the prosecutor was immediately arranged. At this meeting (on January 15th) the prosecutor initiated the discussion by stating that "I had been instructed to file the notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted of this charge, and that he might be liable to a sentence of twenty-five years upon conviction" but that "in the event Mr. DeCavalcante pled guilty, I would be precluded from filing this notification because the language of the statute itself said this notification shall not be filed unless there is a reasonable time before trial."[9] Petitioner responded that he knew "no more about this conspiracy than you do", but he nevertheless agreed to plead guilty upon the prosecutor's representation that such a prompt plea would preclude a charge as a dangerous special offender and the prosecutor's promise that he would recommend a concurrent sentence and would not oppose a suspended sentence. Petitioner was taken directly before the district judge, where his plea was accepted. No mention was made of the role played in the plea negotiations by the prosecutor's threat of a charge under the special-offender provision, nor was there any disclosure at that time of the prosecutor's promise to recommend a lenient sentence.

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9. The prosecutor's statement was somewhat misleading in perhaps suggesting to petitioner that the special-offender statute can be invoked only in the case of a defendant who goes to trial. Under the statute an information can be filed "a reasonable time before trial *or acceptance by the court of a plea of guilty or nolo contendere.*" (Emphasis added.) Since a dangerous-offender information can, in fact, be filed against a defendant who pleads guilty, the real import of the prosecutor's statement to petitioner was that he could avoid the extra penalties flowing from a special-offender charge not merely by pleading guilty, but by promptly tendering his plea to the court. This would likely preclude the prosecutor—who had had authorization to file a dangerous-offender information for several months—from filing the information a "reasonable time" before acceptance of the plea.

It is difficult to conceive of a stronger example than the present case of a "situation where the prosecutor . . . deliberately employ[s] [his] charging . . . powers to induce a particular defendant to tender a plea of guilty." *Brady v. United States,* 397 U. S. 742 at 751, n. 8. Pleas induced by such prosecutorial threats—as well as by other "threats", "misrepresentations," improper promises, and other "impermissible conduct by state agents"—were explicitly excepted in *Brady* from the Court's holding that voluntarily negotiated pleas are ordinarily immune from subsequent attack. Indeed, in *McMann v. Richardson,* 397 U. S. 759, 762 (1970), decided at the same time as *Brady,* the Court had before it an allegation similar to the facts conceded by the Government here. There it was alleged that the plea had been induced by the Judge's (rather than the prosecutor's) "threat to impose a 60-year sentence if [defendant] was convicted after a plea of not guilty." The court of appeals had ordered a hearing to determine the truth of this allegation and the Court expressed "no disagreement with the judgment . . . of the Court of Appeals" on this claim. 397 U. S. at 774. Another closely similar situation was before the Court in *Machibroda v. United States,* 368 U. S. 487 (1962). There petitioner (who had pled guilty) alleged that the Assistant United States Attorney had told him that if he "insisted on making a scene [by advising his lawyer and the court of a prosecutorial promise of a comparatively lenient sentence if a plea was entered]", "certain unsettled matters concerning two other offenses would be added to petitioner's difficulties." The Court held that "if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." 368 U. S. at 493. The threats referred to by the Court in *Machibroda* could only have

been the prosecutor's threats to add "to petitioner's difficulties" by bringing new charges against him.[10]

Prosecutorial threats to file *additional* charges against a defendant, should he refuse to plead guilty to charges already made, are to be sharply distinguished from a prosecutor's agreement to dismiss or reduce certain *pending* charges in return for a guilty plea on other pending charges.[11] Where pending charges are dismissed or reduced in return for a guilty plea, there is substantial protection against prosecutorial impropriety. Charges cannot be formally leveled against a defendant until the grand jury, the prosecutor, or both, have determined that there is a prima facie case of guilt. Once lodged, such charges not only become a matter of public record, but are subject to dismissal if they are legally insufficient or factually frivolous. It would ordinarily be fair to presume, therefore, that where a formal charge has been lodged against

10. See also *Commonwealth v. Dupree,* 442 Pa. 219, 275 A. 2d 326 (1971) where, in a collateral attack instituted years after a plea of guilty to robbery, petitioner alleged that his plea had been induced by the threat to prosecute his wife, as well as himself, for the robbery. (The loot had been divided up in petitioner's home in the presence of his wife.) The Supreme Court of Pennsylvania held that such a threat would render the plea involuntary if it constituted a primary reason for the plea and remanded for a hearing to explore the influence which the threat had upon the plea. To the same effect are *Conley v. Cox,* 138 F. 2d 786 (8th Cir. 1943) and *United States v. Glass,* 317 F. 2d 200 (4th Cir. 1963). *Contra, Kent v. United States,* 272 F. 2d 795 (1st Cir. 1959).

11. In *Brady,* the Court specifically approved of situations involving "(3) the defendant who is permitted by the prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped." 397 U. S. at 751. In a footnote, however, the Court indicated explicitly that, in this list of permissible guilty-plea "bargains", "We . . . make no reference to the situation where the prosecutor or judge, or both, *deliberately employ their charging or sentencing powers to induce a particular defendant to tender a plea of guilty.*" 397 U. S. 751 at n. 8 (emphasis added).

a defendant the prosecutor has not done so solely or primarily for the purpose of inducing a plea of guilty on a different charge. Where a plea is induced by the threat to lodge additional charges, on the other hand, the presumptions are quite the contrary. In a situation like that in the present case—where the prosecutor had authority to file a charge or seek an indictment for several months; where he calculatingly refrained from doing so; where, instead, he broached the question of a guilty plea by threatening to press the additional charge unless a plea was proffered—the presumption can only be that the additional charge has been used to extract a plea of guilty. While *Brady* permits "the State to extend a benefit to a defendant who in return extends a substantial benefit to the State" (397 U. S. at 753), it does not permit a prosecutor thus to use his power to charge for one offense for the purpose of inducing a plea to another. Such a threat is inherently and purposefully coercive.

It should be noted, moreover, that when a *pending* charge is to be dismissed or reduced in return for a plea, the judge will be alerted to the facts of the bargain at the time he considers whether he should accept the plea. Here, however, since the special-offender provision had not in fact been invoked by the prosecutor, the record before the judge gave no indication that the threat of an *additional* charge had induced the plea. As we show in Point II of this petition (pp. 23-25 *infra*), this failure to inform the judge of the relevant terms of the plea bargain violates Rule 11 of the Federal Rules of Criminal Procedure and constitutes independent reason for holding that petitioner must be permitted to plead anew.

B. The instant case differs from *Brady, Parker,* and *McMann* in another significant respect. There the pleas were challenged for the first time on collateral attack years

after imposition of sentence upon a plea of guilty. In the face of such a delayed challenge, the Rules provide that the test is whether corrective action is required "to correct manifest injustice" (see Rule 32(d) of the Federal Rules of Criminal Procedure) and the burden upon the petitioner to show both severe coercion and likely innocence may be a heavy one. See, *e.g., United States v. Stayton,* 408 F. 2d 559 (3d Cir. 1969); *Kadwell v. United States,* 315 F. 2d 667 (9th Cir. 1963). Here, however, the defendant moved to withdraw his plea before imposition of sentence. In such cases "the test to be applied by the trial courts is fairness and justice." *United States v. Stayton, supra,* at 561. "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." *Kercheval v. United States,* 274 U. S. 220, 224 (1927).

Surely, the facts of the instant case—the acknowledged use of a serious threat by the prosecutor; the failure to inform the judge, at the time he accepted the plea, of the circumstances that prompted it; petitioner's assertion of innocence during the plea negotiations and in later proceedings—made out an overwhelming claim upon the judge's discretion.[12]

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12. In declining to permit withdrawal of the guilty plea, the district judge relied upon a finding that "The Government's witnesses have been dismissed and the Government has no knowledge of the whereabouts of one of its key witnesses." The court of appeals stated, on the basis of this finding, that it was justifiable for the judge "to conclude that it would be prejudicial and unfair to the prosecution to permit withdrawal of the plea." The affidavit of the prosecutor which provided the sole basis for the district court's finding, does not, however, support the conclusion that withdrawal of petitioner's guilty plea would either inevitably or even likely result in prejudice to the Government. On the issue of potential prejudice, the prosecutor's affidavit stated in full:

> "The Government would be severely prejudiced should defendant De Cavalcante be allowed to withdraw his plea.

II.

A. In arguing above that petitioner's plea was improperly induced by the threat of an additional charge and that it was therefore an abuse of discretion to deny leave to withdraw that plea, we noted that the district judge, when he accepted the plea, was unaware of the prosecutor's conduct. We submit that it was a violation of Rule 11, as it has been interpreted by this Court, for Government counsel to sit by while the district judge accepted a guilty plea in ignorance of the circumstances which prompted it. Even if the prosecutor believed in good faith that his threats and promises fell within the area of permissible plea bargaining, it was no less his duty to tell the judge what had trans-

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12 (cont'd)

> Several witnesses have relocated to other areas of the country under Government protection. In reliance on the finality of defendants' pleas this Government protection has terminated and one of the key witnesses has moved. The whereabouts of this witness is unknown to the Government. Accordingly, at this time the Government would not be able to proceed to trial against the defendant De Calvalcante."

Thus, the prosecutor stated that, in the two months between the guilty plea and the motion to withdraw, several witnesses have "relocated to other areas of the country under Government protection" and that "one of the key witnesses has moved [and] [t]he whereabouts of this witness is unknown to the Government." Presumably, however, except for the one witness who "has moved" subsequent to relocation, the Government knew the whereabouts of all the other witnesses, including the "several" who had been relocated by the Government. As to the single witness whose whereabouts were said to be "unknown to the Government" ("*one* of the key witnesses"), the prosecutor made no allegation that any effort had been made to find him, and there is certainly no basis for inferring that such an effort would be unavailing. In this light, the prosecutor's statement that "*at this time* the Government would not be able to proceed to trial" (emphasis added) can be taken only as an assertion that an immediate trial would not be feasible, and not as an assertion that the Government's case had been irrevocably prejudiced by the two-month hiatus. Moreover, since the plea that petitioner sought leave to withdraw was induced by prosecutorial misconduct in the first instance, the Government was surely in no position to complain of a two-month delay of trial.

spired so that the judge might determine for himself whether the plea was freely and fairly entered.

Rule 11, this Court has stated, "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy v. United States,* 394 U. S. 459, 465 (1969). It "is intended to produce a complete record at the time the plea is entered" of all factors relevant to the defendant's decision to plead guilty. *Ibid.* It was assuredly relevant to petitioner's plea (indeed, it seems plain that it was determinative of petitioner's decision to plead guilty) that the prosecutor had just told him (1) that the Government would charge him as a dangerous special offender if he went to trial, (2) that it would recommend a concurrent sentence if he pleaded guilty and (3) that it would not oppose a suspended sentence if he entered a plea. Yet, the prosecutor made no reference to any of these facts while the judge, in total ignorance of them, accepted the plea. The prosecution has a responsibility to the court and it obviously cannot shed that obligation by arguing that the defendant, understandably reluctant if not under actual duress, failed to recount the prosecutor's actions.

This case illustrates the practical importance of *McCarthy's* requirement that the elements of a plea bargain be fully disclosed in open court before a plea of guilty is accepted. *First,* subsequent litigation of factual issues is thereby avoided. *Second,* if there is any indication of prosecutorial impropriety, such as a threat to add to the charge or otherwise harass the defendant if he goes to trial, the judge can take immediate steps to dissipate the pressures which have been brought to bear. Thus, in the instant case the judge would have been in a position to advise petitioner that he would not sentence him under 18 U. S. C. 3575 (the special-offender provision) in light of the fact that the prosecution had long refrained from filing such a charge

and used the threat of it as a club to procure a guilty plea. *Third,* any representations which have been made with respect to sentencing, *e.g.,* an undertaking to recommend a lenient sentence, should be made known to the judge so that he can express his views to the defendant. A judge who has no intention of following such a recommendation might well consider it appropriate to advise the defendant that he is to discount that possibility in deciding whether to enter a guilty plea.[13]

It remains only to add that *McCarthy* dictates the remedy to be employed when the record of the "relevant factors" entering into the plea is incomplete. The defendant is to be "afforded the opportunity to plead anew", thus insuring to "every accused" the "safeguard" provided by the Rule. 394 U. S. at 472. That remedy was afforded the defendant in the *McCarthy* case even though his claim of violation was asserted after sentencing. *A fortiori,* the "opportunity to plead anew" must be afforded a defendant who has sought, prior to sentencing, to withdraw his plea.[14]

13. Even without the compulsion of Rule 11, a number of State courts have insisted upon the prosecutor's responsibility to make known to the court all elements of a plea bargain. The Supreme Court of California, sitting *en banc,* has ruled that "[c]ounsel should disclose any plea bargain to the court, and the terms of that agreement should become part of the record of the cause". *People v. West,* 3 Cal. 3d 595, 608-9, 477 P. 2d 409, 417 (1970). The court observed that the defendant cannot be expected to provide that information and that there can be no "justification for concealment." *Ibid.* Pennsylvania recently adopted the same rule when faced with a case in which "the conspiracy of silence respecting the plea bargain extended even to the prosecutor who sat idly by while the court was misinformed concerning the circumstances attending appellant's decision to plead guilty." *Commonwealth v. Alvarado,* 442 Pa. 516, 520, 276 A. 2d 526, 528 (1971).

14. Under the rule stated in the text, it is of course immaterial that the Government may be disadvantaged by the reopening of the case. However, we note additionally that in the instant case the interval between the entry of the guilty plea and the request to plead anew was not protracted and that the Government, although it has asserted prejudice, has demonstrated little more than the customary inconvenience of bringing a case to trial (see p. 22, fn., *supra*).

B. There was a failure of compliance with Rule 11 in a second and discrete respect. As amended in 1966, the Rule states that the "court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." The Notes of the Advisory Committee on Rules point out that the quoted sentence was added in order to adopt the practice which had developed in the State of Michigan. As stated in *People v. Barrows,* 358 Mich. 267, 272, 99 N. W. 2d 347, 350 (1959), "Michigan's rule on acceptance of pleas requires that the court ascertain more about the plea than that the defendant agrees that it is expedient to so plead. The rule is designed to require reasonable ascertainment of the truth of the plea." [15]

The record in the instant case provides no "factual basis" for concluding that the plea had its origin in anything but apprehension and a sense of expediency. To be sure, the district judge did inquire, before he accepted the plea, whether petitioner had done, or caused to be performed, the acts charged to him. Petitioner, however, conspicuously refrained from making any admission with respect to any of the underlying facts, stating merely that he

15. Even before Rule 11 was amended, a number of federal courts had subscribed to the same principle. See, for example, Judge Fahy's comment in *McCoy v. United States,* 363 F. 2d 306, 308 (D. C. Cir. 1966), that it "would be improper" for a court to accept a guilty plea if not satisfied "there was significant evidence that the accused was involved or implicated in the offense." *North Carolina v. Alford,* 400 U. S. 25 (1970), presented the question whether a State judge was constitutionally required to reject a negotiated plea of guilty in the face of the defendant's disclaimer of actual guilt. This Court upheld a conviction based upon the plea, but only because of "*the strong factual basis for the plea* demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence" (400 U. S. at 38; emphasis added.) Moreover, whatever the extent of the *constitutional* compulsion upon a State to investigate the factual basis of a guilty plea, that obligation, as *Alford* re-emphasizes (p. 38, n. 10), is expressly imposed upon federal courts by Rule 11.

was pleading guilty (R. 41-42). The point was underscored by Mr. Brown, petitioner's counsel, who advised the court that petitioner would say nothing to him beyond the fact that he was going to plead guilty. The Government, as earlier observed, remained silent, neither advising the court of the circumstances which precipitated the unexplained change to a plea of guilty nor making any tender to show that it possessed "significant evidence" (*McCoy v. United States,* 363 F. 2d at 308) of the offense charged. Unless the bare conclusory statement, "I plead guilty," is deemed sufficient to show that a plea has "factual basis"—an obviously untenable proposition since the occasion for a judicial inquiry into the facts only occurs after such an averment has been made—it is apparent that the requirements of Rule 11 have not been met. To accept "generalized admissions" of guilt as a substitute for proof of a "factual basis" is "totally inconsistent," the Fourth Circuit has stated, "with the purposes of Rule 11, as set out in *McCarthy* . . . ." *United States v. Tucker,* 425 F. 2d 624, 629 (4th Cir. 1970). See, also, *United States v. Cody,* 438 F. 2d 287, 289 (8th Cir. 1971), in which the court ruled that "reading from the indictment in the presence of the defendant falls far short of demonstrating any factual basis for the defendant's plea."

CONCLUSION.

The testimony of the Government's own representatives establishes that a plea of guilty was improperly elicited from petitioner. Beyond this, it plainly appears that there was a failure of compliance with Rule 11 in two vital respects: *first,* because the circumstances which gave rise to the plea were concealed from the district judge when the plea was accepted, and, *second,* because the judge did not ascertain whether there was "a factual basis for the plea."

This petition should be granted and the judgment below reversed with directions to the district court to afford petitioner opportunity to plead anew.

Respectfully submitted,

RALPH S. SPRITZER,
PAUL BENDER,
Counsel for Petitioner.

October, 1971

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 71-1586.

UNITED STATES OF AMERICA

v.

SAMUEL RIZZO DE CAVALCANTE,

Appellant.

D. C. Criminal No. 544-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

Argued August 25, 1971.

Before HASTIE, ADAMS and ROSENN, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 10, 1971.)

PER CURIAM:

This is an appeal from an order, entered after a full hearing, that denied appellant's motion, filed before sentence, to withdraw his plea of guilty.

On January 2, 1970 appellant had pleaded not guilty to a charge of conspiring to commit a federal offense

through inter-state telephoning in furtherance of an unlawful gambling business. On December 15, 1970, after the completion of pretrial procedures, the district court set February 2, 1971 as the peremptory date for trial. On January 15, 1971, at his own request and after a hearing, appellant was permitted to withdraw that plea and to plead guilty. At that time he was under sentence of the same court to a term of imprisonment pursuant to another conviction, and the prosecutor had advised defense counsel that the government would recommend that any sentence pursuant to the now proposed guilty plea run concurrently with the sentence already imposed and would not oppose a suspended sentence. Subsequently, on March 10, 1971, we reversed the outstanding conviction, directing acquittal on two counts and permitting a new trial on one. *United States v. De Cavalcante*, 3d Cir. 1971, 440 F. 2d 1264. Two days later, appellant filed his present motion for leave to withdraw his guilty plea.

At the conclusion of the hearing on this motion, the district court filed detailed and comprehensive findings of fact and conclusions of law. We here set out the findings of fact in their entirety:

Findings of Fact.

"1. Defendant was at all times herein represented by experienced and able counsel.

"2. Defendant's counsel told defendant in open court that he would not represent the defendant if said plea of guilty were being made for any reason other than that the defendant was in fact guilty as charged.

"3. When the defendant pleaded guilty he knew he had an appeal pending.

"4. Defendant knew that if his conviction were reversed his sentence imposed pursuant thereto would fall.

"5. Defendant told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats.

"6. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that there had been no understanding or prediction made to him concerning his sentence.

"7. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that he made said plea voluntarily and of his own volition.

"8. Defendant knew that only the Court could determine his sentence.

"9. Mr. Posner informed Mr. Rozza on January 13, 1971, that the Government intended to file a notification seeking to treat Mr. De Cavalcante as a dangerous special offender in the event he was convicted upon trial in Criminal Number 544-69, and that should Mr. De Cavalcante plead guilty the Government would recommend a concurrent sentence and not oppose the imposition of a suspended sentence if the Court were inclined to grant one.

"10. At the meeting arranged pursuant to Mr. Brown's request on January 15, 1971, Mr. Posner told the defendant, in the presence of his attorney, that the Government intended to file a notification seeking to treat Mr. De Cavalcante as a dangerous special offender in the event of a conviction. Both the defendant and his counsel were informed that a guilty plea would preclude the filing of said notification.

"11. The defendant was told several times that the Government could not guarantee him what sentence would be imposed by the Court but would not oppose the imposition of a suspended sentence, should the Court be inclined to grant one.

"12. The defendant was concerned about further adverse publicity, and the Government represented that it would not issue any press release regarding a plea of guilty.

"13. The defendant was given an opportunity to speak with his attorney in private, and did so for 15 minutes, after which time he advised Mr. Posner that he would plead guilty.

"14. The Government's witnesses have been dismissed and the Government has no knowledge of the whereabouts of one of its key witnesses."

Our examination of the record satisfies us that it adequately supports all of these findings.

Within this Circuit the withdrawal of a guilty plea before sentence is liberally allowed wherever for any reason the granting of that privilege seems fair and just. *United States v. Stayton*, 1969, 408 F. 2d 559. In the circumstances of this case, the fact that prosecution witnesses had dispersed and the whereabouts of one key witness were unknown caused the district judge to conclude that it would be prejudicial and unfair to the prosecution to permit withdrawal of the plea. This consideration could not have been decisive if the original acceptance of the guilty plea had been improper or improvident. But the district court, after full and careful inquiry, found that the guilty plea was entered voluntarily and knowingly, without any misunderstanding, misrepresentation or improper in-

ducement. Therefore, it was within allowable judicial discretion to view the present unchallenged indication of significant potential prejudice to the prosecution as decisive against allowing a withdrawal of the plea.

The order of the district court will be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 71-1586.

UNITED STATES OF AMERICA

v.

SAMUEL RIZZO DE CAVALCANTE,
Appellant.

D. C. Criminal No. 544-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 19, 1971, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 10, 1971.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

CRIMINAL NO. 544-69.

UNITED STATES OF AMERICA

v.

SAMUEL RIZZO DE CAVALCANTE

ORDER.

The defendant Samuel Rizzo De Cavalcante having moved before the Court for leave to retract his plea of guilty to the charge herein and testimony having been taken, argument made and considered, and the Court having required proposed Findings of Fact and Conclusions of Law to be submitted by the parties and having considered same, I hereby make the following Findings of Fact and Conclusions of Law resulting in the Order hereinafter set forth:

FINDINGS OF FACT.

1. Defendant was at all times herein represented by experienced and able counsel.

2. Defendant's counsel told defendant in open court that he would not represent the defendant if said plea of guilty were being made for any reason other than that the defendant was in fact guilty as charged (R. 41).

3. When the defendant pleaded guilty he knew he had an appeal pending (R. 25).

4. Defendant knew that if his conviction were reversed his sentence imposed pursuant thereto would fall (R. 26).

5. Defendant told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats (R. 28).

6. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that there had been no understanding or prediction made to him concerning his sentence (R. 28).

7. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that he made said plea voluntarily and of his own volition (R. 30-31).

8. Defendant knew that only the Court could determine his sentence (R. 40-41, 43-44).

9. Mr. Posner informed Mr. Rozza on January 13, 1971, that the Government intended to file a notification seeking to treat Mr. De Cavalcante as a dangerous special offender in the event he was convicted upon trial in Criminal Number 544-69, and that should Mr. De Cavalcante plead guilty the Government would recommend a concurrent sentence and not oppose the imposition of a suspended sentence if the Court were inclined to grant one (R. 37-38).

10. At the meeting arranged pursuant to Mr. Brown's request on January 15, 1971, Mr. Posner told the defendant, in the presence of his attorney, that the Government intended to file a notification seeking to treat Mr. De Cavalcante as a dangerous special offender in the event of a conviction. Both the defendant and his counsel were informed that a guilty plea would preclude the filing of said notification (R. 39, 40).

11. The defendant was told several times that the Government could not guarantee him what sentence would be imposed by the Court, but would not oppose the imposi-

tion of a suspended sentence, should the Court be inclined to grant one (R. 40-41).

12. The defendant was concerned about further adverse publicity, and the Government represented that it would not issue any press release regarding a plea of guilty (R. 41).*

13. The defendant was given an opportunity to speak with his attorney in private, and did so for 15 minutes, after which time he advised Mr. Posner that he would plead guilty (R. 42-43).

14. The government's witnesses have been dismissed and the Government has no knowledge of the whereabouts of one of its key witnesses (Government's affidavit).

CONCLUSIONS OF LAW.

1. The plea of guilty entered by the defendant on January 15, 1971, was voluntary, not induced by threats, misrepresentations or promises.

2. Withdrawal of a plea of guilty is not a matter of right but is addressed to the discretion of the Court. *U. S. v. Stayton,* 408 F. 2d 559 (C. A. 3d Cir. 1969).

3. "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. . . . [A]bsent misrepresentation or other impermissible conduct by state

* It should be noted that pursuant to a prior order of the Court, all proceedings prior to trial were to be held in camera. At the time of Mr. De Cavalcante's guilty plea there were a number of other defendants awaiting trial who might have been prejudiced by publicity attendant upon Mr. De Cavalcante's plea of guilty. For this reason the plea was entered in camera, and the minutes thereof were impounded until the peremptory trial date was reached. At that time the plea and all other matters prior to trial were spread upon the record, and the order to impound the minutes was vacated.

agents . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U. S. 742, 38 L. W. 4366, 4371 (1970).

4. "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. *Brady v. United States, supra*, 38 L. W. at 4369. The Supreme Court refused in *Brady* to consider a plea of guilty unconstitutional simply because it was in part affected by considerations of this kind.

5. No reason has been shown which would make the granting to defendant of the privilege to withdraw his plea of guilty seem fair and just. *U. S. v. Stayton, supra.*

6. A withdrawal of defendant's plea of guilty would prejudice the Government.

Based upon the Findings of Fact and Conclusions of Law heretofore set forth,

It is on this 19th day of May, 1971

Ordered, that the Motion of the said defendant to retract his plea of guilty be and the same is hereby denied.

Leonard I. Garth,

U. S. D. C. J

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SUPREME COURT, U. S.
No. 71-611

In the Supreme Court of the United States

OCTOBER TERM, 1971

SAMUEL RIZZO DECAVALCANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

[illegible]
Assistant Attorney General,

[illegible]
Attorneys,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-607

SAMUEL RIZZO DECAVALCANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1971. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 9, 1971, and on November 1, 1971, the petition was filed. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's plea of guilty was voluntarily entered.

STATEMENT

Indictment Cr. 544-69, filed on December 15, 1969, in the United States District Court for the District of New Jersey, charged petitioner and fifty-two others with conspiracy to violate 18 U.S.C. 1952 by jointly promoting and managing a gambling enterprise prohibited by state laws, and traveling in interstate commerce and using the telephone in pursuit of the scheme, in violation of 18 U.S.C. 371. At that time petitioner was already under indictment in a separate federal criminal case for conspiracy and extortion (Cr. No. 111-68, dated March 21, 1968).

On September 15, 1970, trial commenced in Newark on the extortion case (Indictment Cr. 111-68) and ended in conviction of petitioner and his coconspirators. On October 2, 1970, petitioner was sentenced to five years' imprisonment on each of the three counts of Indictment Cr. 111-68, the sentences to run consecutively. These convictions were appealed to the Court of Appeals for the Third Circuit (Nos. 19,310, 19,311, 19,312) and were argued on December 10, 1970.

On January 2, 1970, petitioner pleaded not guilty to the gambling conspiracy indictment (Cr. 544-69) and on December 15, 1970, the district court set February 2, 1971, as the preemptory trial date.

On January 13, 1971, Special Attorney Herbert T. Posner of the Justice Department's Organized Crime and Racketeering Section and the prosecutor in charge

of the gambling conspiracy case by chance met Samuel Bozza, the New Jersey attorney who had represented petitioner in the extortion case, in the hallway of the federal courthouse in Newark (A. 106a; A. 108a).[1] Bozza asked about the status of Indictment Cr. 544-69 and Posner informed the attorney that he had been instructed to file a notification seeking to treat petitioner as a dangerous special offender in the event Indictment Cr. 544-69 resulted in a conviction (A. 109a).[2] Bozza replied that imposing a twenty-five year sentence "would be like killing him." Posner said, however, that if petitioner pleaded guilty the government would recommend imposition of a concurrent sentence, and would not oppose a suspended sentence if the court were inclined to order it. Bozza advised that he would try to convince petitioner to enter the guilty plea (A. 109a).

On January 14, Bozza notified Posner by telephone that petitioner had agreed to plead guilty. Posner called Raymond Brown, petitioner's attorney in the gambling conspiracy case, regarding these events. Brown asked to meet with petitioner and Posner (A. 110a).

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[1] Petitioner was represented in the two cases by different counsel; in Indictment Cr. 111-68 by Samuel Bozza, a member of the bar for forty-two years (A. 76a); in Indictment Cr. 544-69 by Raymond A. Brown, an attorney with extensive criminal law experience (A. 155a). "A." refers to the "Appendix on Behalf of Defendant-Appellant," filed with the Clerk of this Court.

[2] Mr. Posner had already informed petitioner's attorney of record in that case, Raymond Brown, and his law partner, Irving Vogelman, of this development in September or October of 1970 (A. 109a).

The next day Posner, Brown, the petitioner and two Internal Revenue Service agents met for about fifteen minutes at the courthouse in Newark. According to Posner's later testimony (A. 111a-112a), the accuracy of which petitioner does not contest:

> * * * I informed Mr. DeCavalcante and reminded Mr. Brown because I told Mr. Brown and Mr. Vogelman several times I had been instructed to file the notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted of this charge, and that he might be liable to a sentence of twenty-five years upon conviction. I told Mr. DeCavalcante and Mr. Brown that in the event Mr. DeCavalcante pled guilty, I would be precluded from filing this notification because the language of the statute itself said this notification shall not be filed unless there is a reasonable time before trial. At that point, Mr. DeCavalcante said, I want a suspended sentence and I said, the Government would recommend a concurrent sentence and we would not oppose the imposition of a suspended sentence if the Court was so inclined, but I reiterated to Mr. DeCavalcante and Mr. Brown that in no way would this be taken as a guarantee as to what the sentence would be.

When petitioner then expressed concern about the adverse publicity he had been receiving, Posner indicated that he would not oppose holding the proceedings *in camera*, and would not issue a press release. Brown told petitioner that these matters did not constitute appropriate reasons for pleading guilty and that he would not represent petitioner on a guilty plea unless petitioner was in fact guilty of the charge.

Brown told petitioner that the appeal in the extortion case could be decided either way, and petitioner was running the risk that a sentence would have to be served even if the appeal was successful and the other conviction reversed (A. 112a-A. 113a). Brown instructed petitioner that the court would ask questions about the plea, which had to be answered truthfully (A. 113a). Brown then asked Posner and the agents to allow him to speak privately with petitioner. The prosecutor and the agents left the meeting room. About fifteen minutes later Brown summoned Posner, and stated that petitioner had decided to plead guilty (A. 113a).

That same day, January 15, 1971, before the Honorable Leonard I. Garth, the petitioner, with Mr. Brown as counsel, retracted the original plea of not guilty and entered a guilty plea to Indictment Cr. 544-69.

Pursuant to the petitioner's request, the hearing was held *in camera* (A. 58a). Judge Garth inquired as to the petitioner's background, his health, his physical well-being, whether the defendant was acquainted with Indictment Cr. 544-69, whether he had reviewed the indictment with counsel (A. 36a-A. 38a). The court then recited the portion of the indictment applicable to petitioner, stating that it charged that from January 1, 1965, to the date of return, petitioner and others had willfully and knowingly conspired to commit offenses in violation of 18 U.S.C. 1952; that in executing the conspiracy, telephone calls had been made between New Jersey and Troy, New York, and elsewhere to promote and man-

age a gambling enterprise violative of specified New Jersey penal statutes; that petitioner and others had traveled between New Jersey and New York and elsewhere with intent to promote the unlawful enterprise; that petitioner and one Alessio Barrasso had supervised and controlled the business of accepting wagers while other co-defendants served in other capacities necessary to the success of the enterprise; and that, as an overt act, petitioner and Alessio Barrasso had met together on December 15, 1968, at 21 Michigan Avenue, Kenilworth, New Jersey (A. 38a-A. 41a). The court then continued (A. 41a-42a):

> THE COURT: Now, I've read that Indictment in its pertinent part to you, Mr. DeCavalcante, to determine if that is the Indictment to which you now desire to retract your not guilty plea and to which you now desire to plead guilty.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And the matters which are charged, the facts and matters charged therein, the matters which were either performed by you or caused to be performed by you within the terms of that indictment, sir?
>
> MR. BROWN (Defense Counsel): Did you do these things that the indictment says, supervise them?
>
> THE DEFENDANT: I plead guilty.
>
> THE COURT: You plead guilty?
>
> THE DEFENDANT: That's right.

Judge Garth then discussed the maximum punishment and determined that petitioner was aware that his plea constituted a waiver of trial and of the right to produce witnesses in his own behalf (A. 42a). The

Court then asked the following questions (A. 42a-43a):

> THE COURT: Is this plea that you are now making a voluntary plea and one of your own volition?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have there been any threats or promises made to you to induce you to plead guilty?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has there been any understanding or prediction made to you concerning the sentence that you will receive?
>
> THE DEFENDANT: No, sir.

Petitioner's attorney then stated (A. 43a):

> MR. BROWN: If your Honor pleases, in Mr. Posner's presence I informed Mr. DeCavalcante for the last time, no less than forty minutes ago, that you would ask and he must answer truthfully as to whether or not he was guilty of the charges, and not plead for any accommodation or any hope or speculation or anything else, and I told him that if he were not guilty that I would not represent him on the plea and that he should not therefore plead guilty, and I'm repeating that for his benefit now. He informed me that he was pleading guilty to the charge. That's all he said.

The Court, after this colloquy, granted the petitioner's motion and accepted the retraction and entered a plea of guilty to Indictment Cr. 544-69 (A. 44a).

On March 10, 1971, the court of appeals decided the extortion case (Indictment Cr. 111-68), reversing

in part and in part remanding for a new trial. On March 12, 1971, petitioner filed a motion for leave to withdraw his guilty plea in Indictment Cr. 544-69. On March 15, 1971, after a hearing, Judge Garth denied the motion (155a-159a). Thereafter, Judge Garth filed Findings of Fact and Conclusions of Law upon which the denial was predicated. These Findings of Fact were as follows (Pet. App. 35-37):

> 1. Defendant was at all times herein represented by experienced and able counsel.
>
> 2. Defendant's counsel told defendant in open court that he would not represent the defendant if said plea of guilty were being made for any reason other than that the defendant was in fact guilty as charged (R. 41)[3] [A. 112a].
>
> 3. When the defendant pleaded guilty he knew he had an appeal pending (R. 25) [A. 96a].
>
> 4. Defendant knew that if his conviction were reversed his sentence imposed pursuant thereto would fall (R. 26) [A. 97a].
>
> 5. Defendant told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats (R. 28) [A. 99a].
>
> 6. Defendant told the truth when he stated to the Court at the time of entering his guilty plea that there had been no understanding or prediction made to him concerning his sentence (R. 28) [A. 99a].
>
> 7. Defendant told the truth when he stated to the Court at the time of entering his guilty plea

[3] "R." indicates the page of the transcript of proceedings of March 15, 1971, cited by the trial court; the bracketed citation which follows shows the page of the Appendix which reproduces the cited page of the transcript.

that he made said plea voluntarily and of his own volition (R. 30-31) [A. 101a-102a].

8. Defendant knew that only the Court could determine his sentence (R. 40-41, 43-44) [A. 111a-A. 112a, A. 114a-A. 115a].

9. Mr. Posner informed Mr. Bozza on January 13, 1971, that the Government intended to file a notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event he was convicted upon trial in Criminal Number 544-69, and that should Mr. DeCavalcante plead guilty the Government would recommend a concurrent sentence and not oppose the imposition of a suspended sentence if the Court were inclined to grant one (R. 37-38) [A. 108a-A. 109a].

10. At the meeting arranged pursuant to Mr. Brown's request on January 15, 1971, Mr. Posner told the defendant, in the presence of his attorney, that the Government intended to file a notification seeking to treat Mr. DeCavalcante as a dangerous special offender in the event of a conviction. Both the defendant and his counsel were informed that a guilty plea would preclude the filing of said notification (R. 39-40) [A. 110a-A. 111a].

11. The defendant was told several times that the Government could not guarantee him what sentence would be imposed by the Court, but would not oppose the imposition of a suspended sentence, should the Court be inclined to grant one (R. 40-41) [A. 111a-A. 112a].

12. The defendant was concerned about further adverse publicity, and the Government represented that it would not issue any press release regarding a plea of guilty (R. 41) [A. 112a].

13. The defendant was given an opportunity to speak with his attorney in private, and did so for fifteen minutes, after which time he advised Mr. Posner that he would plead guilty (R. 42-43) [A. 113a-114a].

14. The Government's witnesses have been dismissed and the Government has no knowledge of the whereabouts of one of its key witnesses (Government affidavit) [A. 57a].[4]

Petitioner was sentenced on March 15, 1971, to a term of five years in prison and a $10,000 fine (A. 173a-A. 176a).

ARGUMENT

Petitioner contends that the prosecutor's statement that he was instructed to file an information designating petitioner a "dangerous special offender" (18 U.S.C. 3575), if the case went to trial, rendered the guilty plea involuntary. The information regarding the instruction to invoke the dangerous offender statute at trial was factually correct. The prosecutor did not suggest that the statute was unusable if petitioner pleaded guilty, but that an immediate plea would preclude its use in view of the statutory requirement of reasonable notice before a plea or a trial. Petitioner undoubtedly weighed the fact that that statute could not be applied if he pleaded guilty immediately; that consideration, however, did not constitute unlawful inducement. As stated in *Brady* v. *United States*, 397 U.S. 742, 754:

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[4] The missing witness has since been located.

> * * * prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage.

Significantly petitioner makes no argument that he was not a proper subject for treatment as a dangerous special offender. Petitioner's quotation from *Brady* [5] (Pet. 19) concerning the impropriety of "the prosecutor * * * deliberately employ[ing] [his] charging * * * powers to induce * * *" a plea is too selective. The Court continues:

> In Brady's case there is no claim that the prosecutor threatened prosecution *on a charge not justified by the evidence* * * * [emphasis added].

So here there is no claim that the government lacked either evidence or cause to treat petitioner as a dangerous special offender.

Petitioner analogizes the filing of a special offender information to the filing of a new charge and attempts to draw a constitutional distinction between a plea bargain to dismiss or reduce pending charges (which he deems permissible) and an agreement not to file additional charges (which he considers impermissible). Particularly in a case such as this, where there is no suggestion that the additional charge is

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[5] *Brady* v. *United States*, 397 U.S. 742 at 751, n. 8.

"not justified by the evidence," there is no basis for such a distinction. Pressures emanating from the obligation to provide a speedy trial require that indictments be sought as soon as the evidence is sufficient. It is not at all unusual, after indictment and during trial preparation, to have evidence accumulate justifying additional charges or a superseding indictment. If a trial is to be had, judicial economy requires—except in cases of prejudicial joinder—that related charges be tried together. If a defendant faced with the prospect of a superseding indictment elects to plead to the pending one, he is no more coerced than a defendant who bargains for a reduced charge.

Petitioner also argues that, despite his representations when he entered the plea, there was an agreement reached prior to acceptance of the plea which the government was under a duty to disclose. However, as the district court found, the only promise made by the prosecutor was that he would recommend concurrent sentences and would not oppose suspension if the Court were inclined to grant it, but the prosecutor also made it clear that the government could not guarantee what sentence would be imposed. Since petitioner sought to withdraw his plea prior to sentence, and since the other sentence had by then been vacated, the government never had the opportunity to make good on its promise.[6] Thus the district

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[6] *Santobello* v. *New York*, certiorari granted, 402 U.S. 994, is inapposite. That case involves the unknowing breach by one Assistant District Attorney of another's agreement with the defendant that, in exchange for a plea of guilty, the state would make no recommendations at the sentence hear-

court properly found that petitioner "told the truth when he stated to the Court at the time of entering his plea of guilty that said plea was not induced by any promises or threats."

Finally, petitioner argues that Judge Garth violated the portion of Rule 11 prohibiting the entry of a judgment on the plea unless the court was "satisfied that there is a factual basis for the plea." The judge was not required to make that determination upon accepting the plea but only before entering judgment on the plea.[7] The record contains several indications that the court was aware of the facts before entry of judgment. There was evidence of the existence of an extensive and updated probation report. In imposing sentence, the court noted that it was tailoring the punishment to the degree of culpability of each of the defendants charged in the conspiracy indictment. Moreover, by the time of sentence, more than thirty of the co-defendants had pleaded guilty before Judge Garth, many had been sentenced by him, and charges against four others had been dismissed—

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ing. As Judge Garth noted, the government's only assurance in this case related to the recommendation of a concurrent sentence (A. 130a). Because the hearing on petitioner's motion to withdraw his plea occurred before sentencing, the government could not possibly have violated any terms of an agreement, knowingly or unknowingly.

[7] The court is not required to obtain its knowledge of a factual basis from the defendant. The Advisory Committee suggests three alternative sources: (1) the defendant; (2) the prosecutor; and (3) the presentence report. Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules; see also *McCarthy* v. *United States*, 394 U.S. 459, 463, n. 6.

some the very day of petitioner's hearing. To suggest that Judge Garth was unaware of the underlying facts would be unrealistic in light of the court's long experience with this case via numerous co-defendants. Neither Rule 11 nor the cases cited by petitioner require that the court set forth a detailed factual basis in the record. Certainly the Rule is satisfied in a case where the record shows that the court was aware of the facts before entering judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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